IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. DANIEL WAYNE MULLICAN, Appellant.	)	2 CA-CR 2006-0148 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200500027

Honorable Thomas E. Collins, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Alan L. Amann — Tucson
Attorneys for Appellee

Jeffrey G. Buchella — Tucson
Attorney for Appellant

V Á S Q U E Z, Judge.

¶1 A jury found Daniel Wayne Mullican guilty of two counts of sexual conduct with a minor, and the trial court sentenced him to twenty-six years in prison, pursuant to A.R.S. § 13-604.01, the dangerous crimes against children statute.[1] On appeal, Mullican contends there was insufficient evidence to prove he had committed two separate offenses of sexual conduct and that his twenty-six-year sentence violates both the Supreme Court's holding in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), and the Eighth Amendment's prohibition against cruel and unusual punishment. We affirm.

Facts and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdicts. *State v. Miles*, 211 Ariz. 475, ¶ 2, 123 P.2d 669, 670 (2005). On November 28, 2004, J.B. contacted the Sierra Vista Police Department because he was concerned about the relationship his fourteen-year-old daughter, K.B., was having with Mullican, who was twenty-three years old at the time. Officer Chris Hiser responded to the call and questioned K.B. about her involvement with Mullican. K.B. confirmed she was having a relationship with Mullican, but she described it as a "friendship." Hiser next contacted Mullican who, after initially stating he had not seen K.B. for several months, admitted seeing her on a

[1]We note the sentencing minute entry does not reflect that Mullican was sentenced pursuant to A.R.S. § 13-604.01. However, based on the actual sentence Mullican received and the trial court's reference to § 13-604.01 during sentencing, we think it clear he was, in fact, sentenced pursuant to the statute. *See State v. Wheeler*, 108 Ariz. 338, 342, 498 P.2d 205, 209 (1972) (conflicts between minute entry and transcript resolved based upon specific circumstances of case). Furthermore, the parties do not dispute Mullican's sentencing under § 13-604.01, and the statute is the crux of his arguments on appeal.

weekly basis as friends. Hiser later advised J.B. to obtain an "injunction against harassment" to prevent further contact between Mullican and K.B. J.B. obtained the injunction, which was served on Mullican on December 1, 2004.

¶3 On January 8, 2005, Mullican's father and his girlfriend were at a storage shed in Tombstone when Mullican arrived with K.B. The girlfriend questioned Mullican about him being with K.B., because she was aware of the order of protection having been issued. Mullican informed her that "it's been taken care of." Two days later the girlfriend contacted Detective Hillig at the Sierra Vista Police Department and informed him of what she had seen. Detective Hillig interviewed K.B. at school and she told him she and Mullican had had sexual intercourse at his trailer and that Mullican had used a Trojan condom. Hillig then obtained and executed a search warrant for Mullican's trailer. During their search, officers found an empty Trojan brand condom wrapper in a trash can inside the trailer.

¶4 The following day Hillig interviewed Mullican at the Sierra Vista Police Department. Mullican agreed to speak with the detective after she advised him of the *Miranda* warning.[2] Initially, Mullican denied that he and K.B. had a sexual relationship, but he later admitted to Hillig that they had had sex approximately three to four times. He also admitted that he knew K.B. was fourteen. Following the interview, Mullican was placed under arrest.

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[2]*See Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966).

¶5 Mullican was charged with three counts of sexual conduct with a minor under fifteen years of age and one charge of interfering with judicial proceedings by violating the injunction against harassment. The indictment also alleged Mullican had violated § 13-604.01, the "dangerous crimes against children" statute. On July 12, 2005, Mullican pled guilty to all counts. However, on July 22, he moved to withdraw his guilty plea and for substitution of counsel. The trial court granted both motions, and Mullican eventually requested a jury trial.

¶6 At trial, after closing arguments, but before the jury returned a verdict, Mullican moved for a directed verdict on the dangerous crimes against children allegations pursuant to Rule 20, Ariz. R. Crim. P. The trial court denied the motion. The jury found him guilty of two counts of sexual conduct with a minor under fifteen years of age, acquitted him on the third, and found him guilty of interfering with a judicial proceeding. At sentencing, the trial court found the sexual conduct convictions to be dangerous crimes against children, pursuant to § 13-604.01, and sentenced Mullican to enhanced, consecutive, mitigated prison terms of thirteen years on each count. The trial court sentenced him to six months' imprisonment for interfering with judicial proceedings, to be served concurrently with the other sentences. The trial court also granted Mullican the opportunity to petition the Board of Executive Clemency to have his sentences commuted. His petition was apparently denied. Mullican timely appealed.

Discussion

Sufficiency of Evidence

¶7 We first address Mullican's argument that there was insufficient evidence to support his convictions for two separate offenses of sexual conduct with a minor. He asserts the testimony concerning the sexual activity was "extremely limited, and insufficient, to make clear that [Mullican]'s conduct fell within the conduct prescribed by the statute" and, therefore, could not support the convictions.

¶8 Convictions must be based on substantial evidence. *State v. Carlisle*, 198 Ariz. 203, ¶ 11, 8 P.3d 391, 394 (App. 2000). "Substantial evidence is more than a mere scintilla and is such proof that 'reasonable persons could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt.'" *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990), *quoting State v. Jones*, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980). We will not set aside a jury verdict for insufficient evidence unless it "clearly appear[s] that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987); *see also State v. Alvarado*, 178 Ariz. 539, 541, 875 P.2d 198, 200 (App. 1994). In determining whether sufficient evidence supports a conviction, we "view the evidence in the light most favorable to sustaining the verdict, and . . . resolve all reasonable inferences against the defendant." *State v. Atwood*, 171 Ariz. 576,

596, 832 P.2d 593, 613 (1992), *overruled on other grounds by State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 717 (2001).

¶9 The crime of sexual conduct with a minor under the age of fifteen requires proof that the defendant "intentionally or knowingly engage[d] in sexual intercourse or oral sexual contact" with a minor who is under fifteen years of age. A.R.S. § 13-1405. At trial, K.B. testified that she and Mullican first had sexual intercourse on December 9, 2004. And, when asked if they last had sex on January 8, 2005, K.B. said, "Yes." She also responded affirmatively when asked whether "[d]uring those times that [she] had sex with [Mullican] . . . he put his penis into [her] vagina." Although she admitted she and Mullican were interrupted on January 8, she also indicated that she and Mullican had already engaged in oral sex prior to having sexual intercourse. K.B. testified she was born on July 2, 1990, making her fourteen the last time she and Mullican had had sex. Finally, she also stated that she had informed Mullican of her age.

¶10 K.B.'s testimony was corroborated by Detective Hillig, who testified that Mullican had admitted having had sex with K.B. "approximately three or four times" and had stated January 8 was the last time he and K.B. had had sex. This evidence more than sufficiently supports the conclusion beyond a reasonable doubt that Mullican had engaged in sexual intercourse or oral sexual contact with K.B. on both December 9 and January 8 and that K.B. was under fifteen years of age at the time.

Applicability of § 13-604.01

¶11 Mullican next argues the trial court erred in concluding his convictions constituted "dangerous crimes against children" for purposes of enhancing his sentences under § 13-604.01. He contends the jury did not specifically find that the elements of the dangerous crime against children allegations had been proven beyond a reasonable doubt. Furthermore, he argues, the lack of specific findings was not harmless because the evidence presented was insufficient to support such findings.

¶12 At trial Mullican moved for a directed verdict, pursuant to Rule 20, Ariz. R. Crim. P., on the dangerous crimes against children allegations because they had not been separately submitted to the jury. The trial court denied the motion, reasoning that the required elements were a necessary part of the jury's verdict and therefore did not require separate findings.

¶13 On appeal, Mullican relies on *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), for the proposition that he was entitled to have a jury "ma[k]e a determination that [he] had committed 'dangerous crimes against children.'" As a general matter, he is correct. *Cf. State v. Miranda-Cabrera*, 209 Ariz. 220, ¶¶ 25-30, 99 P.3d 35, 41-42 (App. 2004) (harmless error review appropriate in absence of specific findings by jury that state proved dangerous crimes against children allegations). In *Blakely*, the Supreme Court held that a judge may not impose a sentence greater than the maximum sentence supported by facts "reflected in the jury verdict or admitted by the defendant." 542 U.S. at

303, 124 S. Ct. at 2537; *see also Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."). However, if the facts necessary to enhance a sentence are a necessary part of the jury verdict, no additional findings are required. *See Blakely*, 542 U.S. at 304, 124 S. Ct. at 2537-38; *Miranda-Cabrera*, 209 Ariz. 220, ¶ 29, 99 P.3d at 42.

¶14 For the enhanced sentencing provisions under § 13-604.01 to apply, the state had to prove Mullican committed sexual conduct "against a minor who is under fifteen years of age." § 13-604.01(N)(1)(E); *see also* § 13-1405(B) (making sexual conduct with a minor under fifteen punishable pursuant to § 13-604.01). The jury verdict forms reflect its findings that "on or about December 9, 2004" and "January 8, 2005, [Mullican] committ[ed] sexual conduct with a minor by knowingly engaging in sexual intercourse or oral sexual contact with K.B. . . . , a person under 15 years of age . . . ."

¶15 Mullican nonetheless argues the jury's verdicts are not sufficient because § 13-604.01 requires a factual finding that he targeted K.B. because of her age. He suggests the state was required to prove he "preyed on K.B. . . . because she was under the age of fifteen" before his sentence could be enhanced. And, he contends his interpretation of § 13-604.01 has consistently been recognized by the courts of this state.

¶16 In *State v. Williams*, 175 Ariz. 98, 99, 854 P.2d 131,132 (1993), the defendant, while drunk, struck a station wagon with his truck and injured a child who happened to be riding inside. The trial court sentenced him pursuant to § 13-604.01 for committing a dangerous crime against children. *Id*. Our supreme court vacated the sentence and remanded, distinguishing the defendant's "unfocused conduct" from the conduct of those who are "peculiarly dangerous to children." *Id*. at 103-04, 854 P.2d at 136-37. The court concluded that for § 13-604.01 to apply, "the defendant's conduct must be focused on, directed against, aimed at, or target a victim under the age of fifteen." *Id*. at 103, 854 P.2d at 136. It is this language that Mullican believes supports his argument. We disagree.

¶17 In *State v. Sepahi*, 206 Ariz. 321, ¶ 12, 78 P.3d 732, 734 (2003), the supreme court reiterated its holding in *Williams*, but clarified its scope. The fourteen-year-old defendant in *Sepahi* had fought with a fourteen-year-old girl and then shot her in the stomach. *Id*. ¶¶ 3-4. The trial court sentenced him pursuant to § 13-604.01. *Id*. ¶ 5. But this court vacated the sentence, reasoning under *Williams* that § 13-604.01 only applies to defendants who are "'peculiarly dangerous to children,' or otherwise 'pose[] a direct and continuing threat to the children of Arizona.'" *State v. Sepahi*, 204 Ariz. 185, ¶ 14, 61 P.3d 479, 483 (App. 2003).

¶18 In vacating this court's decision, our supreme court recognized the difficulty of reconciling "the notion that § 13-604.01 requires that the defendant pose 'a direct and continuing threat to children' with the clear statement in *Williams* that the defendant need

not know the age of the victim." *Sepahi*, 206 Ariz. 321, ¶ 17, 78 P.3d at 734, *quoting Williams*, 175 Ariz. at 103, 854 P.2d at 136. Relying on *Williams*, the court held that Sepahi's intent to shoot the victim, who happened to be a minor, was sufficient to constitute a dangerous crime against children. *Sepahi*, 206 Ariz. 321, ¶ 17, 78 P.3d at 734. Thus, the court reaffirmed that in *Williams* it "h[e]ld *only* that the victim must be the person against whom the crime is directed, not that the accused must know that the person is under fifteen." *Id., quoting Williams*, 175 Ariz. at 103, 854 P.2d at 136. "When an individual targets a person, he or she generally assumes the risk that the victim will turn out to be within a protected age group." *Williams*, 175 Ariz. at 103, 854 P.2d at 136.

¶19 Finally, in *State v. Miranda-Cabrera*, 209 Ariz. 220, ¶¶ 2-6, 99 P.3d at 36-37, the defendant had agreed to assist a family to cross into the United States from Mexico, but abandoned them during the journey. The family became lost in the desert, and their thirteen-year-old son died from dehydration and heat exhaustion. *Id*. ¶¶ 2, 6-7. Miranda-Cabrera was convicted of second-degree murder for the child's death and sentenced under § 13-604.01. *Id*. ¶¶ 8-10.

¶20 On appeal, Miranda-Cabrera argued the trial court had erred in sentencing him under § 13-604.01 because there was no proof his conduct had been sufficiently focused on the child to trigger the statute. *Id*. ¶ 13. He further argued, as Mullican does here, that *Blakely* required the jury to make a specific finding regarding whether his conduct focused on the child. *Id*. ¶¶ 13, 28. Division One of this court rejected both arguments. *Id.* ¶¶ 13,

29-30. With regard to the sufficiency of the defendant's focus on the child, the court held that Miranda-Cabrera's intent to leave the entire family, which included the thirteen-year-old, demonstrated "his conduct was sufficiently focused on [the child] to enhance the sentence, even if the harm was not intended." *Id.* ¶ 22. The court also suggested that the defendant's own testimony that he had led the family into the desert and abandoned them "establish[ed] that [his] conduct was sufficiently directed at [the child] to satisfy the 'targeting' requirement for this offense to constitute a dangerous crime against children." *Id.* ¶ 29. Thus, a separate finding of this fact by the jury was unnecessary under *Blakely*.[3] *Miranda-Cabrera*, 209 Ariz. 220, ¶ 29, 99 P.3d at 42; *see also Blakely*, 542 U.S. at 303, 124 S. Ct. at 2537 (at sentencing phase, defendant only entitled to have jury find facts not already reflected in verdict or admitted by defendant).

¶21 *Williams*, *Sepahi*, and *Miranda-Cabrera* demonstrate that a defendant need not "prey upon or target a child for the commission of the crime . . . because the child is a child" to be subject to enhanced sentencing. All that is required is that "the defendant . . . have directed his conduct toward a victim who happens to be under the age of fifteen . . . ." *Miranda Cabrera*, 209 Ariz. 220, ¶ 20, 99 P.3d at 40.

¶22 Here, the evidence established that Mullican intended to have intercourse with K.B., who was under the age of fifteen at the time. The jury's verdict specifically stated it

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[3]The court also noted that the trial court's enhancement of the defendant's sentence without specific jury findings was harmless error, given his testimony at trial. *State v. Miranda-Cabrera*, 209 Ariz. 220, ¶ 30, 99 P.3d 35, 42 (App. 2004).

had found, beyond a reasonable doubt, that Mullican "knowingly engag[ed] in sexual intercourse or oral sexual contact with [K.B.]." From the wording in the verdict, the jury necessarily found his conduct was "focused on, directed against, aimed at, or target[ed]" K.B. *See Williams*, 175 Ariz. at 103-04, 854 P.2d at 136-37 ("[W]hether the child victim is the target of the defendant's criminal conduct will rarely be an issue . . . . It is impossible to imagine how . . . sexual conduct . . . could be committed without targeting persons."). Nothing more is required. *Miranda-Cabrera*, 209 Ariz. 220, ¶ 22, 99 P.3d at 40 (recklessness sufficient if conduct focused on minor); *Sepahi*, 206 Ariz. 321, ¶ 12, 78 P.3d at 734 (victim must be target of criminal conduct).

¶23 Because we have concluded the jury's verdicts necessarily included a finding the offenses constituted dangerous crimes against children, we need not address Mullican's argument that the trial court's enhancement of his sentence was prejudicial error. *See Miranda-Cabrera*, 209 Ariz. 220, ¶ 20, 99 P.3d at 40. The trial court correctly sentenced Mullican pursuant to § 13-604.01.

Constitutionality of Sentence

¶24 Finally, Mullican argues his sentences violate the Eighth Amendment to the United States Constitution, which prohibits cruel and unusual punishment, and article II, § 15 of the Arizona Constitution.[4] He contends "twenty-six years in prison, day for day,

[4]Mullican does not argue that the Arizona constitutional provision prohibiting cruel and unusual punishment should be interpreted differently from the Eighth Amendment, nor do we find a "compelling reason" to do so. *State v. Davis*, 206 Ariz. 377, ¶ 12, 79 P.3d 64,

because he had a consensual relationship with a fourteen year old young wom[a]n, which included three or four sexual contacts" is grossly disproportionate and thus violates the Eighth Amendment.

¶25 The Eighth Amendment "bars the infliction of 'cruel and unusual punishments.'" *State v. Berger*, 212 Ariz. 473, ¶ 8, 134 P.3d 378, 380 (2006), *cert. denied*, __U.S.__, 127 S. Ct. 1370 (2007), *quoting* U.S. Const. amend. VIII. However, courts are "extremely circumspect" in their review of Eighth Amendment challenges to prison terms, and only in "'exceedingly rare' cases will a sentence to a term of years violate the Eighth Amendment . . . ." *Id.*, ¶¶ 10, 17, *quoting Ewing v. California*, 538 U.S. 11, 22, 123 S. Ct. 1179, 1186 (2003). "In noncapital cases, the Eighth Amendment prohibits only those punishments that are '"grossly disproportionate"' to the crime committed." *State v. Eggers*, 215 Ariz. 472, ¶ 55, 160 P.3d 1230, 1247 (App. 2007), *quoting Ewing*, 538 U.S. at 23, 123 S. Ct. at 1187, *quoting Harmelin v. Michigan*, 501 U.S. 957, 1001, 111 S. Ct. 2680, 2705 (1991) (Kennedy, J., concurring).

¶26 Whether a sentence is grossly disproportionate is determined according to the framework outlined in Justice Kennedy's concurrence in *Harmelin* and later adopted by the majority in *Ewing*. 538 U.S. at 23-24, 123 S. Ct. at 1187; *see also Berger*, 212 Ariz. 473, ¶ 11, 134 P.3d at 380-81. First, the reviewing court determines whether a "threshold

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67-68 (2003). Therefore our Eighth Amendment discussion encompasses Mullican's state claim. *See State v. Eggers*, 215 Ariz. 472, n.9, 160 P.3d 1230, 1247 n.9 (App. 2007).

comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." *Harmelin*, 501 U.S. at 1005, 111 S. Ct. at 2707 (Kennedy, J., concurring). Then, if the inference exists, "it is tested through comparing that state's punishment scheme for other crimes and the sentences imposed in other states for the same crime." *Eggers*, 215 Ariz. 472, ¶ 55, 160 P.3d at 1247.

¶27 In making this determination, we "accord substantial deference to the legislature and its policy judgments . . . ." *Berger*, 212 Ariz. 473, ¶ 13, 134 P.3d at 381. Four principles guide our determination of proportionality: "'the primacy of the legislature, the variety of legitimate penological schemes, the nature of our federal system, and the requirement that proportionality review be guided by objective factors.'" *Ewing*, 538 U.S. at 23, 123 S. Ct. at 1186, *quoting Harmelin*, 501 U.S. at 1001, 111 S. Ct. at 2705 (Kennedy, J., concurring). Applying these factors, the courts of this state have repeatedly upheld the legislature's authority and discretion to enact the mandatory sentencing provisions in § 13-604.01. *See, e.g.*, *Berger*, 212 Ariz. 473, ¶¶ 22-23, 134 P.3d at 383 (legislature had reasonable basis to believe mandatory, lengthy sentences for possession of child pornography would further its intent to protect children from predators); *State v. Davis*, 206 Ariz. 377, ¶¶ 36-37, 79 P.3d 64, 71-72 (2003) (upholding general application of § 13-604.01 sentencing scheme, but finding its application to defendant grossly disproportionate); *State v. Jonas*, 164 Ariz. 242, 248, 792 P.2d 705, 711 (1990) (noting,

with respect to sentence pursuant to § 13-604.01, it is province of legislature, not court, to determine what constitutes "'serious' offense"). We decline to find differently today.

¶28 Mullican nonetheless argues that the sentencing scheme, as applied to his case, results in a grossly disproportionate sentence. For this proposition, he relies on *State v. Davis*, 206 Ariz. 377, 79 P.3d 64 (2003), and *State v. Bartlett*, 171 Ariz. 302, 830 P.2d 823 (1992), both cases in which our supreme court found sentences for sexual conduct convictions pursuant to § 13-604.01 unconstitutional. His reliance on these cases is misplaced.

¶29 In *Bartlett*, the twenty-three-year-old defendant was sentenced to a total of forty years for two counts of sexual conduct with a minor. 171 Ariz. at 303, 830 P.2d at 824. The minors involved were both under fifteen years of age and willingly had engaged in sexual acts with the defendant. *Id*. Bartlett received mitigated, minimum sentences of fifteen years for the first count and twenty-five years for the second, which had to be served consecutively. *Id*.

¶30 In finding Bartlett's sentences grossly disproportionate to the offenses, the court focused on four factors: 1) lack of violence, 2) lack of prior criminal record, 3) the "realities of adolescent life," and 4) "the evolution of the law and present sentencing standards." *Id*. at 307-08, 830 P.2d at 828-29. Thus, it noted the victims' consent, Bartlett's lack of a criminal record, his cooperation with law enforcement, and recognized "'sexual conduct among post-pubescent teenagers is not uncommon.'" *Id*. at 308, 830 P.2d

at 829, *quoting State v. Bartlett*, 164 Ariz. 229, 235, 792 P.2d 692, 698 (1990), *vacated by* 501 U.S. 1246 (1991). The court also recognized the current trend to "separate the crime of statutory rape from other violent forms of rape, and concomitantly to reduce the severity of the sentence." *Bartlett*, 171 Ariz. at 308, 830 P.2d at 829. It also conducted inter- and intra-jurisdictional comparisons of punishment schemes, finding the punishment for this crime disproportionate to more serious crimes in Arizona and similar crimes in other states. *Id*. at 310, 830 P.2d at 831. Ultimately, it concluded,

> [Bartlett], with no prior felony history, has received a 40-year penalty for sexual conduct with two consenting post-pubescent teenagers. The broad application of the statute to encompass this situation results in a penalty grossly out of proportion to the severity of the crime. Although such a harsh penalty may be justified in the context of other, more heinous crimes included within the sentencing scheme, it is not justified under the special circumstances of this case.

Id. at 309, 830 P.2d at 830.

¶31 Similarly, in *Davis*, the defendant, who was twenty years old at the time of the crime, received a fifty-two-year sentence for convictions on four counts of sexual conduct with a minor. 206 Ariz. 377, ¶¶ 1-3, 79 P.3d at 66. The minors involved were thirteen and fourteen. *Id*. Relying heavily on *Bartlett*, our supreme court found Davis's sentence unconstitutional. *Id*. ¶¶ 14-46, 49. It adopted the same factors used by the court in *Bartlett* and also looked at the "victims' willing participation" and the defendant's immaturity and far below average intelligence. *Id*. ¶¶ 16, 36. The court also reviewed the intra- and inter-

jurisdictional comparisons in *Bartlett* and found that "[l]ittle ha[d] changed" since *Bartlett* was decided. *Id*. ¶¶ 39, 44.

¶32 The court in *Davis* additionally considered the consecutive nature of the sentences as a separate factor in its proportionality analysis. *Id*. ¶¶ 47-49. It reasoned that the mandatory, consecutive nature of the sentences was "one of the causes of the disproportionality" in that case. The court noted that "[a]lthough this court normally will not consider the imposition of consecutive sentences in a proportionality inquiry, this case cries out for departure from that general rule." *Id*. ¶ 47.

¶33 Finally, in *Berger*, in sharp contrast to *Bartlett* and *Davis*, our supreme court upheld a two-hundred-year sentence, comprised of twenty consecutive, ten-year prison terms for convictions on twenty counts of sexual exploitation of a minor under fifteen. 212 Ariz. 473, ¶ 1, 135 P.3d at 379. It found Berger's sentences proportionate to each crime, and declined to consider the proportionality of the consecutive sentences. *Id*. ¶¶ 44, 51.

¶34 In looking at the relevance of aggregate sentences in Eighth Amendment analysis, the *Berger* court noted, "if the sentence for a particular offense is not disproportionately long, it does not become so merely because it is consecutive to another sentence for a separate offense or because the consecutive sentences are lengthy in aggregate." *Id*. ¶ 28. It then distinguished *Berger* from its prior analysis in *Davis*, noting that, in *Davis*, the court first found that Davis's conduct was "at the edge of the statute's broad sweep of criminal liability" before going on to assess the impact of the mandatory

consecutive sentences. *Id*. ¶¶ 41-42. In contrast, the court placed Berger's crimes, the knowing possession of child pornography, "at the core, not the periphery of the prohibitions of [the relevant statute]," and concluded there was "no basis here to depart from the general rule that the consecutive nature of sentences does not enter into the proportionality analysis." *Id*. ¶ 44.

¶35 Mullican argues this case is factually similar to *Davis* and *Bartlett*, and, therefore, this court should likewise find his sentences unconstitutional. He also urges us to consider the consecutive nature of the sentences in our determination. The trial court found Mullican's sentence to be "clearly excessive," and entered a special order to permit Mullican to petition for clemency. To support that finding, the trial court specifically found:

> [T]he victim testified that the sex was her idea . . . , that they were in love, [and] that the defendant would have raised any child produced.
>
> The victim was not coerced or physically harmed in any manner.
>
> The Defendant did not seek out stranger victims and did not exhibit typical pedophile behavior.
>
> A psychiatric evaluation shows the defendant to have antisocial personality disorder and that he has a history of sexual and physical abuse resulting in the development of significant attachment difficulties and is immature with . . . above average emotional and psychological problems which contribute to an overall d[y]sfunction.

However, despite finding the sentence excessive, the trial court did not find that it violated the Eighth Amendment. We agree.

¶36 "The Constitution does not prohibit severe sentences; it prohibits only 'grossly disproportionate' sentences." *Eggers*, 215 Ariz. 472, ¶ 61, 160 P.3d at 1249. Although Mullican, like the defendants in *Davis* and *Bartlett*, was sentenced for "consensual sex with [a] post-pubescent teenager[]," two factors readily distinguish Mullican's conduct and militate against a finding of gross disproportionality. *Bartlett*, 171 Ariz. at 309, 830 P.2d at 830. Mullican knowingly violated an injunction against harassment to have sex with K.B. Mullican was served with the injunction a week before he and K.B. first had sex. And, when Mullican's father's girlfriend appeared concerned that Mullican and K.B. had shown up together at his father's storage shed, Mullican assured her that the order of protection had been "taken care of."

¶37 Mullican intentionally violated a court order and lied about it. In doing so, Mullican moved his conduct away from the "periphery" of the statute to the "core" conduct the statute was designed to prevent. *See Berger*, 212 Ariz. 473, ¶ 44, 135 P.3d at 386-87. In essence, Mullican was warned prior to pursuing a sexual relationship with K.B., and he failed to heed that warning. Therefore, unlike *Davis* and *Bartlett*, Mullican was not "caught in the very broad sweep of the governing statute" of § 13-604.01. *See Davis*, 206 Ariz. 377, ¶ 36, 79 P.3d at 72. He had engaged in sexual acts with a child that he knew were prohibited, even after explicitly being ordered by the court to have no contact with that child.

¶38 Furthermore, Mullican also had a prior conviction, which he fully admits in his opening brief and discusses its weight in light of *Davis* and *Bartlett*. Mullican, who was seventeen at the time of the prior offense, allegedly kidnapped and sexually abused a thirteen-year-old neighbor. He pled, as an adult, to the kidnapping charge, received probation, and was required to register as a sex offender. This prior conviction was not proven or used at trial. But it was included in the presentence report, and the trial judge explicitly considered it prior to sentencing. However, the prior conviction was not used to aggravate or enhance Mullican's sentence[5] and Mullican did not object to the trial court's limited consideration of it below, nor does he on appeal. The existence of the prior conviction also serves to move Mullican's conduct away from the periphery and into the core types of conduct § 13-604.01 is intended to punish. Thus, it further distinguishes Mullican from the defendants in *Bartlett* and *Davis* and provides additional support for us to conclude his sentences were not grossly disproportionate.

¶39 We recognize the evidence of Mullican's lack of maturity, personal history of abuse, and the lack of violence in this case. However, Mullican received thirteen years for each count of sexual conduct with a minor. This is the minimum, mitigated sentence he could have received under the statute for each offense. In light of Mullican's blatant

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[5]*See Almendarez-Torres v. United States*, 523 U.S. 224, 243-48, 118 S. Ct. 1219, 1230-33 (1998) (trial court must find existence of prior conviction beyond reasonable doubt when used to aggravate or enhance sentence); *see also Blakely v. Washington*, 542 U.S. 296, 303, 124 S. Ct. 2351, 2537 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 2363 (2000).

disregard for the injunction against harassment, his sentences, while severe, are not grossly disproportionate. Thus, we need not look at the cumulative total sentence or conduct inter- and intra-jurisdictional analyses. *See Harmelin*, 501 U.S. at 1005, 111 S. Ct. at 2707 (Kennedy, J., concurring); *Eggers*, 215 Ariz. 472, ¶ 62, 160 P.3d at 1249. Mullican's sentences do not violate the Eighth Amendment.

Disposition

¶40 For the foregoing reasons, we affirm Mullican's convictions and sentences.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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PHILIP G. ESPINOSA, Judge